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No. 711

In the Supreme Court of the United States

OCTOBER TERM, 1960

JOSE MARIA GASTELUM-QUINONES, PETITIONER

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (R. 54–61; Pet. App. 1a–8a) has not yet been reported. The memorandum of the district court is not reported (R. 50–52).

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1960 (R. 62; Pet. App. 9a). A petition for rehearing was denied on January 9, 1961 (R. 70, 71). The petition for a writ of certiorari was filed on February 10, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence was sufficient to show that the petitioner was deportable as an alien who had become a member of the Communist Party within the meaning of Section 241 of the Immigration and Nationality Act of 1952.

STATUTE INVOLVED

Section 241 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1251) provides in pertinent part:

> (a) General Classes.
>
> Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—
>
> * * * * * *
>
> (6) is or at any time has been, after entry, a member of any of the following classes of aliens:
>
> * * * * * *
>
> (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States; * * *.
>
> * * * * * *

STATEMENT

The petitioner, a native and national of Mexico, seeks review of the judgment of the court of appeals affirming a judgment of the District Court for the District of Columbia which denied him relief from an order directing his deportation on the ground that he is an alien who, after entry into the United States, had become a member of the Communist Party within the meaning of Section 241(a)(6)(C) of the Immigration and Nationality Act.

1. THE PROCEEDINGS AND FINDINGS

On February 28, 1957, after a hearing at which the petitioner refused to testify, a special inquiry officer of the Immigration and Naturalization Service found, on the basis of testimony by government witnesses, that the petitioner had entered the United States in 1920 and that subsequent thereto he had been a voluntary member of at least two units of the Communist Party. The officer ordered that the petitioner be deported (R. 6–28).

On November 14, 1957, an appeal from the order of deportation was dismissed by the Board of Immigration Appeals (R. 29–33) on the ground that the government's testimony had established a prima facie case of voluntary membership in the Party during the years 1948 or 1949 to 1950 (R. 30).

On January 13, 1958, after this Court's decision in *Rowoldt* v. *Perfetto*, 355 U.S. 115 (decided December 9, 1957), the petitioner moved the Board for reconsideration of the order of deportation in the light of the decision or for reopening of proceedings to enable him to offer testimony. The Board, although concluding that on the existing record *Rowoldt* did not govern the case, ordered the hearing reopened to permit the petitioner to present evidence (R. 34–37).

At a reopened hearing before the special inquiry officer on December 16, 1958, the petitioner did not testify or present evidence, but offered merely a statement by counsel that the existing record did not

establish "meaningful membership" in the Party within the meaning of *Rowoldt* v. *Perfetto*. The inquiry officer, faced with the record previously considered, reaffirmed his original decision that the petitioner, after entry into this country, had been shown to be a voluntary member of the Communist Party by reasonable, substantial and probative evidence (R. 38–42).

The Board of Immigration Appeals dismissed an appeal, finding again that the record, upon which both sides were content to rest, established meaningful membership (R. 43–44).

On May 22, 1959, the petitioner filed in the district court a complaint for declaratory and injunctive relief against the order of deportation. The complaint alleged that the finding of Communist Party membership was not based upon the required reasonable, substantial and probative evidence but upon unwarranted inferences, and that the statute under which deportation was ordered was unconstitutional as applied (R. 1–3). On September 21, 1959, the court granted the government's motion for summary judgment, holding that the case was governed by this Court's decision in *Galvan* v. *Press*, 347 U.S. 522, and that the hearing officer had a right to act upon the testimony offered by the government (R. 50–52).

The court of appeals affirmed, holding that the finding of meaningful membership was established by the record. It noted that the government had made a prima facie case by proving voluntary membership, and the burden was on the petitioner to come

forward with an explanation. It did not find it necessary to determine whether an inference could be drawn from the petitioner's silence (R. 61; Pet. App. 8a).

2. THE TESTIMONY

At the hearing before the special inquiry officer, two witnesses, former members of the Communist Party during the years 1947 through 1951 and 1952, testified to having known the petitioner as a Party member (R. 45, 81, 94).

One, Daniel Scarletto, met the petitioner in early 1949 and saw him thereafter at two meetings of the El Sereno Club, a unit of the Party consisting of 32 members (R. 81–82, 78). Attendance at the meetings was restricted to Party members (R. 79–82) and the petitioner was a member of this unit (R. 82). When, on Party orders in 1949, the El Sereno unit was broken into smaller units for security reasons (R. 79) both the petitioner and Scarletto were transferred to the Mexican Concentration Club (R. 82–83). The petitioner was a regular member of this unit and his membership continued to the latter part of 1950 (R. 83). Scarletto saw the petitioner at the closed meetings of the unit (R. 86–87) and collected Party dues from him (R. 84). Scarletto also saw the petitioner at a Communist Party convention. Attendance was restricted solely to Party members; each person seeking admission was required to appear before a screening panel, state his club and position, and be identified by members of the panel before being permitted to enter (R. 86).

The other witness, Fabian Elorriaga, met the petitioner at a meeting of the 45th Concentration Club of the Party (R. 93). The petitioner was a member of this club (R. 93, 97). The witness thereafter saw the petitioner at the regular meetings of the club over a period of three years (R. 94). The meetings were closed to all but Party members (R. 94). Elorriaga also recalled an executive meeting at which the petitioner was present. The meeting was either for organizational purposes or to form an agenda. Executive meetings were restricted to Party members and probably to officials of the unit (R. 94–95). At a later point in the hearing, Elorriaga testified that he recalled two closed meetings of the Concentration Club (in 1949 and 1951) at which the petitioner was in attendance [1] (R. 46, 98).

ARGUMENT

1. The sole issue here is whether the petitioner is subject to deportation as an alien who, after entry,

[1] The Board of Immigration Appeals observed that this testimony of Elorriaga was inconsistent with his earlier account that the petitioner was seen in regular attendance at meetings over a period of three years. It did not find it necessary however to resolve the conflict "since we regard Elorriaga's testimony as corroborative and it establishes that the respondent was a member of the Communist Party". (R. 32–33).

The special inquiry officer characterized Elorriaga as a "very tense, nervous, and overcautious" witness who gave the impression of qualifying statements of simple facts within his knowledge in an exaggerated effort to achieve accuracy in his testimony. The officer said (R. 23): "[n]otwithstanding the foregoing, I am satisfied that Elorriaga was sincere and honest in testifying."

has been a member of the Communist Party under *Galvan* v. *Press*, 347 U.S. 522, or whether he is saved from deportation under *Rowoldt* v. *Perfetto*, 355 U.S. 115. The issue is not, as the petitioner suggests, a legal one. It is a factual issue turning upon the evaluation of testimony upon which the order of deportation is based. See *Niukkanen* v. *McAlexander*, 362 U.S. 390, 391.

In *Galvan*, this Court stated that the test of membership under the statute was met when "the alien joined the Party, aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will." 347 U.S. 528–529. The Court found this test met by the alien's admissions (later repudiated) that he had joined the Party, attended meetings, and refrained from applying for citizenship for fear of exposing membership, and by testimony of a witness that the alien had been an officer in an alleged Party unit.

In *Rowoldt*, this Court distinguished *Galvan* on its facts (355 U.S. at 120, 121), finding that the evidence of the alien's membership emanating from the alien himself did not show "meaningful" membership where at the same time the alien made repeated uncontradicted statements that his admitted membership in the Party during 1935 was motivated solely by the "fight for something to eat and clothes and shelter" (*id.* at 119):

There is nothing in the present case to bring it within the holding of *Rowoldt*. Here, as in *Galvan*, there was evidence from independent sources which, if believed, would establish that the petitioner was an active, dues-paying, voluntary member of the Communist Party. Unlike *Rowoldt*, there is nothing in the record which could suggest that the alleged association was motivated by considerations other than political. The petitioner never suggested otherwise, although the hearing was reopened at his request to permit him to bring himself within the framework of *Rowoldt*.

In the light of these considerations, the court below properly upheld the administrative finding that the petitioner's membership in the Communist Party was "meaningful". The decision below represents no departure from established principles; it is consistent with decisions since *Rowoldt*. See *Niukkanen* v. *McAlexander, supra*; *Schleich* v. *Butterfield*, 252 F. 2d 191 (C.A. 6), certiorari denied, 356 U.S. 971. See also *Rystad* v. *Boyd*, 246 F. 2d 246 (C.A. 9), certiorari denied, following *Rowoldt*, 355 U.S. 912.

2. There is no occasion for the Court to reconsider constitutional issues settled by *Galvan* v. *Press*. The Court was requested to do so in *Niukkanen* v. *McAlexander*, 362 U.S. 390, but, although sustaining the deportation found it unnecessary to reconsider the constitutional issue in its opinion.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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No. 711

[illegible] MARIA GASTELUM QUIÑONES, Petitioner,

v.

WILLIAM P. ROGERS, Attorney General,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY FOR PETITIONER

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REPLY FOR PETITIONER

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1. The government is wrong in asserting that the issue involved in this case is not "a legal one," but merely "a factual issue turning upon the evaluation of testimony" (Opp. 7).

As we understand *Rowoldt* v. *Perfetto*, 355 U. S. 115, in a Communist deportation case (1) the Immigration and Naturalization Service has the burden of proving that the alien's Party membership was a "meaningful

association," and (2) this burden is not satisfied merely by showing, without more, that the alien had attended some Party meetings and paid dues. Whether or not *Rowoldt* means this is clearly a legal issue. This issue is important practically, as well as theoretically, because of the large number of aliens who are, and the many more who may be, involved in deportation cases of this kind.

This legal issue is posed squarely and starkly in this case because (1) the Court of Appeals and the Board of Immigration Appeals flatly held that once organizational membership was shown, a "meaningful association" would be presumed or inferred unless rebutted by the alien, and (2) the court below and the Board held petitioner deportable solely on findings of attendance at meetings and payment of dues. These rulings are, as shown in our petition, both novel and dubious.

The presence of a legal issue in this case was explicitly recognized by the Board of Immigration Appeals which stated that the case involved an "evaluation of Rowoldt" (R. 37). The legal issue is even laid bare in the government's Statement, which says (Opp. 4-5): "The court of appeals affirmed. . . . It noted that the government had made a prima facie case by proving voluntary membership, and the burden was on the petitioner to come forward with an explanation."

In its argument the government fails to recognize the legal issue involved in this case only because it disregards the findings, the holdings and the language of the court below and the Board. We may be sure, however, that if the decision below is allowed to stand, the government's perception will be sharpened, and it

will thereafter rely on the decision as an important legal precedent for sustaining deportation cases which would otherwise be too flimsy to survive in the light of *Rowoldt*.

2. We must protest the government's version of the facts. The government says (Opp. 8), "Here, as in *Galvan*, there was evidence from independent sources which, if believed, would establish that the petitioner was an *active*, dues-paying, voluntary member of the Communist Party" (emphasis supplied). The Board of Immigration Appeals expressly held (R. 35) that petitioner's membership in the Communist Party "was found to have been established on the testimony of government witness, Scarletto, who testified that he had collected Communist Party dues from the respondent and had attended closed meetings of the Communist Party with him and the general corroboration offered by the testimony of government witness Elorriaga." If the word "active" in the government's statement means anything other than attendance at meetings, it does not jibe with the administrative findings. If "active" means only attendance at meetings, it tends to conceal the fact that the evidence does not satisfy the standard of *Rowoldt*, in which case the alien was a dues-paying voluntary member who had attended meetings.

The government's summary of the testimony (Opp. 5-6) on its face indicates no "activity" by petitioner beyond payment of dues and attendance at meetings. Even so the summary goes beyond the evidence which the fact-finding agency was willing to consider. The government refers (Opp. 6) to testimony of Elorriaga (R. 94) that he saw petitioner at three or four Club meetings a month over a three-year period, including

an executive meeting. It relegates to a footnote the fact that the Board of Immigration Appeals refused to find these particulars because they were inconsistent with the witness' later testimony that he saw petitioner at only two or three meetings of the Club (R. 32-33).

Again, the government states, "Scarletto also saw the petitioner at a Communist Party convention" (Opp. 5). The government neglects to point out that neither the Board nor the court below found any significance in this fact or placed any reliance on it. The reason why this matter was inconsequential appears from Scarletto's testimony on the subject (R. 86):

> "I saw him [petitioner] at one convention one time.
>
> "Q. Do you recall when that was?
> "A. It was when I was in the El Sereno Club, we had a convention one time, at Echo Park, at the Echo Park Women's Club, a big hall, they had, and I saw Joe Gastelum there.
>
> "Q. Do you know whether he was there on [sic] an official capacity?
> "A. No."

Respectfully submitted,

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ROBERT F. KENNEDY, ATTORNEY GENERAL

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 711

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On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR REHEARING

---

1. If the denial of certiorari in this case stands, the immediate result will be that petitioner will be deported from the country where he has lived for forty-one years, since the age of ten, to a land to which he is now a stranger, leaving behind his wife, his American-born children and grandchildren, his friends, and the base for his livelihood. These harsh consequences will be incurred as a result of an order based on a record

which shows, at most, an inactive, nominal membership for a short period in the Communist Party. The legal theory by which the expulsion was justified, in the face of *Rowoldt* v. *Perfetto*, 355 U. S. 115, was the novel and doubtful doctrine that meaningful Party membership would be presumed merely from a showing of organizational membership, and that the burden was on the alien to rebut this presumption. So the court below stated (R. 61) that the deportation statute draws a rebuttable "presumption of support" of the Communist Party "from the bare fact of membership;" that "the burden is on the alien to come forward with an explanation, the Government having made a *prima facie* case by proving voluntary membership;" "and since [petitioner] here failed to offer any evidence whatsoever, the presumption must stand."

If the decision below is permitted to stand, the purposeless cruelty of the expulsion in this case will be repeated in many more cases in which there will also be applied the rule that the burden of proof is on the alien. Yet as a practical matter, the aliens involved will not have the opportunity to reach this Court for review of that rule. This is because there is no provision for an automatic stay of deportation pending judicial review. Such stays are obtained, frequently with great difficulty, only on application to, and by special order of, the reviewing courts. In view of the decision in this case and the denial of certiorari, the courts in other cases will, in all likelihood, regard the rule as to burden of proof settled, and will not stay deportation to permit its testing. Even if stays are granted in some cases, they will undoubtedly be denied in others, so that the aliens in the latter cases will be deported before they can apply

for certiorari or even before they can perfect an initial appeal.

Yet the rule placing the burden of proof on the alien has never been approved by this Court nor has it been applied by any decision other than the present one. Even the government did not defend the validity of this rule in its opposition to the petition for certiorari. Instead, it argued, contrary to the facts, that the case involved only an assessment of the evidence to determine if the *Rowoldt* standard was met. This circumstance, however, is buried in the archives of the Court. It will not prevent the Immigration Service from considering that it has now received complete judicial approval of its doctrine that a "normal inference" of meaningful association derives from joining the Communist Party (see R. 37, 41-42); it will not cause the Court of Appeals for the District of Columbia Circuit to re-examine its presumption doctrine; and it will not convince other courts that the burden of proof question is still open.

Certainly a rule of this importance both legally and practically, and a rule which will in the future have wide application in immigration cases, should not receive this Court's approval in this *sub silentio* fashion. Whether the rule is correct or not, it requires consideration by this Court so that litigants in the future may be guided as to the nature of the rule and so that the rule may not be followed as having been sanctioned by this Court, without the Court's express approval.

2. It may be that the denial of certiorari in this case was influenced by the view that no great burden is placed on an alien by requiring him to tell his story

if he wants to get the benefit of the ameliorating doctrine of *Rowoldt*. Any such view is superficial and unrealistic.

In the first place, it is a highly dangerous precedent to make an inroad on the previously firm principle that the government has the burden of proving that the alien is squarely within a deportable class. Attrition of this principle in cases in which the deportable class consists of non-nominal members of the Communist Party will inevitably spread to other situations.

Secondly, there are a substantial number of aliens against whom administrative deportation proceedings have been completed on grounds of past Communist membership, who did not choose to testify because they believed that the Service had not carried the burden of proving that the alleged membership was more than nominal. These aliens will not have a chance to satisfy the new rule that the burden of proof is on them. They will be deported, even though in fact they were no more than nominal members, simply because they could not anticipate the novel rule shifting the burden of proof.

Thirdly, it is frequently a difficult and dangerous thing for an alien to testify about his connections with the Communist Party even if in fact he never was a member or if he was only a nominal member.

In the typical political deportation case, the accusation relates to a highly remote period, going back ten, twenty and even thirty years. The Service's witnesses are embittered ex-Communists, anxious to expiate their past, or professional witnesses. Frequently they are aliens or naturalized citizens who fear that unless they propitiate the Immigration Service they themselves

may incur deportation or denaturalization proceedings on account of their past Party membership. Accusations of Communism are, as cases in this Court have shown, frequently untrustworthy and perjurious. Often, unreliable witnesses magnify into Party "membership" contacts which non-Communists had with Communists in a different political climate than the present.

The alien, therefore, particularly if he has had some left-wing associations in the past, has ample reason to fear that his truthful denial of membership, or his truthful explanation that membership was nominal, may involve him in a perjury prosecution based on the testimony of untruthful witnesses. Furthermore, the chances are that his testimony will do him no good in the deportation proceeding. The Service's Special Inquiry Officers have a predisposition to credit the "impartial" accusing witnesses over the "interested" alien. Where the witness is a professional, his repeated utilization by the government virtually forecloses examining officers from discrediting him.

This very case illustrates the point. Two witnesses testified that petitioner had been a member of the Communist Party. Elorriaga's testimony was so self-contradictory that the Board of Immigration Appeals was unable to make specific findings thereon, but yet treated it as "corroborative" of Scarletto's testimony (R. 33). Elorriaga also had lied about his Party membership when he applied for and obtained employment in a defense plant (Tr. 108-110, 154). Although the FBI had knowledge of his employment in defense industry and questioned him about his Communist Party membership, Elorriaga retained his defense employment (Tr. 134-37).

The other witness, Scarletto, is a professional anti-Communist witness. Appearing as a government witness in the Communist Party case before the Subversive Activities Control Board, he gave lurid testimony which turned out to be entirely at variance with his report to the FBI and with an account he had given of the alleged incident only a few weeks before when testifying as a government witness in a Smith Act case.* Eventually, even the Subversive Activities Control Board refused to credit his testimony (see our Petition for Certiorari, p. 3, ftn. 1). In the deportation case against petitioner, the Board of Immigration Appeals found that Scarletto falsified his state of health in applying for an insurance policy with the IWO in order, as he said, to carry out his instructions from the FBI, and also "was not frank in regard to his marital history" (R. 31-32). Yet the Board fully credited his testimony against petitioner (R. 30).

Respectfully submitted,

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Attorneys for Petitioner

CERTIFICATE

I certify that this petition for rehearing is presented in good faith and not for delay and that it is restricted to substantial grounds available to petitioner although not previously presented.

DAVID REIN

---

* See Brief for Petitioner, pp. 206-07, in No. 48, Oct. Term 1955, *Communist Party* v. *Subversive Activities Control Board*.